

Senate Bill No. 377

Passed the Senate September 8, 1999

Secretary of the Senate

Passed the Assembly September 3, 1999

Chief Clerk of the Assembly

This bill was received by the Governor this _____ day
of _____, 1999, at _____ o'clock ____M.

Private Secretary of the Governor

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CHAPTER _____

An act to amend Sections 18935 and 19683 of the Government Code, to amend Section 289.6 of, and to repeal and add Section 6129 of, the Penal Code, relating to corrections.

LEGISLATIVE COUNSEL'S DIGEST

SB 377, Polanco. Criminal conduct of state employees.

Existing law provides that the State Personnel Board may refuse to examine, or after examination, may refuse to declare as eligible, or may withhold or withdraw from certification, prior to appointment, persons within specified categories.

This bill would provide as an additional category, persons who have engaged in unlawful reprisal or retaliation against other persons employed by specified state agencies.

Existing law requires any state officer or employee filing a complaint of reprisal or retaliation to have also previously filed a complaint of improper governmental activity with the Joint Legislative Audit Committee.

This bill, instead, would require the complaint of improper governmental activity to be filed with the State Auditor, or with the Inspector General, as specified.

Under existing law, an employee or officer of a public entity or an employee, officer, or agent of a private person or entity that provides a detention facility or staff for a detention facility under contract with a public entity, who engages in sexual activity with a consenting adult who is confined in a detention facility, as defined, is guilty of a misdemeanor. A second violation of that provision is a felony. "Detention facility" is defined for these purposes under existing law to include a health facility.

This bill would remove the definition of "health facility" from its present inclusion within the term "detention facility." The bill would recast existing law to provide that the above provision applies to employees of



health facilities, and add the application of that provision to employees of a department, board, or authority under the Youth and Adult Correctional Agency, or a facility under contract to a department, board, or authority under the Youth and Adult Correctional Agency. The bill would also expand the definition of “sexual activity” for purposes of the provisions. By expanding the scope of a crime, this bill would impose a state-mandated local program.

The bill would provide for misdemeanor and felony punishments, as specified, for violation of certain provisions. By changing the definition of a crime, this bill would impose a state-mandated local program.

The bill would also provide that an employee of a department, board, or authority under the Youth and Adult Correctional Agency convicted of a felony under these provisions would be terminated pursuant to provisions of the State Civil Service Act, and would not be eligible to be hired or reinstated by a department, board, or authority under the Youth and Adult Correctional Agency.

Existing law provides that certain state employees who intentionally engage in acts of reprisal, retaliation, threats, or other proscribed conduct against a state employee, as specified, who has disclosed what the employee believes to be improper government activities, shall be disciplined. Existing law also provides that certain state employees who engage in the above-proscribed acts shall be liable in an action for damages, and may be liable for punitive damages and attorney’s fees, as specified.

This bill would provide that the above-described provisions also apply where the proscribed conduct is directed against an employee, as defined, (1) who has disclosed or is disclosing to any employee at a supervisory or managerial level what the employee believes to be improper government activities, or (2) who has cooperated or is cooperating with any investigation of improper government activity.

This bill would also specify the minimum discipline that the offending employee would be subject to, and define



what the term “retaliation” means for purposes of the act. This bill would also declare that nothing in the act would prohibit the employing entity from making any decision exercising its authority to terminate, suspend, or discipline an employee who engages in conduct prohibited by the act.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares that the mission of the Youth and Adult Correctional Agency and all of the boards and departments under its jurisdiction is such a serious matter that any incident of staff misconduct is an unacceptable risk to the public safety of all Californians. Similarly, any incident of retaliation against an employee who reports improper governmental activities is unacceptable. In that vein, the purpose of this bill is to assure the people of California that reports of improper governmental activity by corrections employees are responded to expeditiously and appropriately, and without retaliation.

SEC. 2. Section 18935 of the Government Code is amended to read:

18935. The board may refuse to examine or, after examination, may refuse to declare as an eligible or may withhold or withdraw from certification, prior to appointment, anyone who comes under any of the following categories:

(a) Lacks any of the requirements established by the board for the examination or position for which he or she applies.

(b) At the time of examination has permanent status in a position of equal or higher class than the examination or position for which he or she applies.



(c) Is physically or mentally so disabled as to be rendered unfit to perform the duties of the position to which he or she seeks appointment.

(d) Is addicted to the use of intoxicating beverages to excess.

(e) Is addicted to the use of controlled substances.

(f) Has been convicted of a felony, or convicted of a misdemeanor involving moral turpitude.

(g) Has been guilty of infamous or notoriously disgraceful conduct.

(h) Has been dismissed from any position for any cause which would be a cause for dismissal from the state service.

(i) Has resigned from any position not in good standing or in order to avoid dismissal.

(j) Has intentionally attempted to practice any deception or fraud in his or her application, in his or her examination or in securing his or her eligibility.

(k) Has waived appointment three times after certification from the same employment list.

(l) Has failed to reply within a reasonable time, as specified by the board, to communications concerning his or her availability for employment.

(m) Has made himself or herself unavailable for employment by requesting that his or her name be withheld from certification.

(n) Is, in accordance with board rule, found to be unsuited or not qualified for employment.

(o) Has engaged in unlawful reprisal or retaliation in violation of Article 3, Chapter 6.5 (commencing with Section 8547 of the Government Code), as determined by the State Personnel Board or the court.

SEC. 3. Section 19683 of the Government Code is amended to read:

19683. (a) The State Personnel Board shall initiate a hearing or investigation of a written complaint of reprisal or retaliation as prohibited by Section 8547.3 within 10 working days of its submission. The executive officer shall complete findings of the hearing or investigation within 60 working days thereafter, and shall provide a copy of the



findings to the complaining state employee or applicant for state employment and to the appropriate supervisor, manager, or appointing authority. When the allegations contained in a complaint of reprisal or retaliation are the same as, or similar to, those contained in another appeal, the executive officer may consolidate the appeals into the most appropriate format. In these cases, the time limits described in this subdivision shall not apply.

(b) If the findings of the executive officer set forth acts of alleged misconduct by the supervisor, manager, or appointing power, the supervisor, manager, or appointing power may request a hearing before the State Personnel Board regarding the findings of the executive officer. The request for hearing and any subsequent determination by the board shall be made in accordance with the board's normal rules governing appeals, hearings, investigations, and disciplinary proceedings.

(c) If, after the hearing, the State Personnel Board determines that a violation of Section 8547.3 occurred, or if no hearing is requested and the findings of the executive officer conclude that improper activity has occurred, the board may order any appropriate relief, including, but not limited to, reinstatement, backpay, restoration of lost service credit, if appropriate, and the expungement of any adverse records of the state employee or applicant for state employment who was the subject of the alleged acts of misconduct prohibited by Section 8547.3.

(d) Whenever the board determines that a manager or supervisor has violated Section 8547.3, it shall cause an entry to that effect to be made in the manager's or supervisor's official personnel records. Adverse action shall also be invoked by the appointing power against the offending manager or supervisor in accordance with Sections 8547.8 and 19572.

(e) Notwithstanding Section 8547.8, any state officer or employee filing a complaint of reprisal or retaliation pursuant to subdivision (a) also shall have previously filed a complaint of improper governmental activity with the State Auditor, pursuant to Section 8547.7, or with the



Inspector General, pursuant to Section 6129 of the Penal Code.

(f) In order for the Governor and the Legislature to determine the need to continue or modify state personnel procedures as they relate to the investigations of reprisals or retaliation for the disclosure of information by public employees, the State Personnel Board, by June 30 of each year, shall submit a report to the Governor and the Legislature regarding complaints filed, hearings held, and legal actions taken pursuant to this section.

SEC. 4. Section 289.6 of the Penal Code is amended to read:

289.6. (a) (1) An employee or officer of a public entity health facility, or an employee, officer, or agent of a private person or entity that provides a health facility or staff for a health facility under contract with a public entity, who engages in sexual activity with a consenting adult who is confined in a health facility is guilty of a public offense. As used in this paragraph, “health facility” means a health facility as defined in subdivisions (b), (e), (g), (h), and (j), and subparagraph (C) of paragraph (2) of subdivision (i) of Section 1250 of the Health and Safety Code, in which the victim has been confined involuntarily.

(2) An employee or officer of a public entity detention facility, or an employee, officer, or agent of a private person or entity that provides a detention facility or staff for a detention facility, or person or agent of a public or private entity under contract with a detention facility, or a volunteer of a private or public entity detention facility, who engages in sexual activity with a consenting adult who is confined in a detention facility, is guilty of a public offense.

(3) An employee with a department, board, or authority under the Youth and Adult Correctional Agency or a facility under contract with a department, board, or authority under the Youth and Adult Correctional Agency, who, during the course of his or her employment directly provides treatment, care, control, or supervision of inmates, wards, or parolees, and who



engages in sexual activity with a consenting adult who is an inmate, ward, or parolee, is guilty of a public offense.

(b) As used in this section, the term “public entity” means the state, federal government, a city, a county, a city and county, a joint county jail district, or any entity created as a result of a joint powers agreement between two or more public entities.

(c) As used in this section, the term “detention facility” means:

(1) A prison, jail, camp, or other correctional facility used for the confinement of adults or both adults and minors.

(2) A building or facility used for the confinement of adults or adults and minors pursuant to a contract with a public entity.

(3) A room that is used for holding persons for interviews, interrogations, or investigations and that is separate from a jail or located in the administrative area of a law enforcement facility.

(4) A vehicle used to transport confined persons during their period of confinement.

(5) A court holding facility located within or adjacent to a court building that is used for the confinement of persons for the purpose of court appearances.

(d) As used in this section, “sexual activity” means:

(1) Sexual intercourse.

(2) Sodomy, as defined in subdivision (a) of Section 286.

(3) Oral copulation, as defined in subdivision (a) of Section 288a.

(4) Penetration, however slight, of the genital or anal openings of another person by a foreign object, substance, instrument, or device, for the purpose of sexual arousal, gratification, or abuse.

(5) The rubbing or touching of the breasts or sexual organs of another, or of oneself in the presence of and with knowledge of another, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of oneself or another.



(e) Consent by a confined person or parolee to sexual activity proscribed by this section is not a defense to a criminal prosecution for violation of this section.

(f) This section does not apply to sexual activity between consenting adults that occurs during an overnight conjugal visit that takes place pursuant to a court order or with the written approval of an authorized representative of the public entity that operates or contracts for the operation of the detention facility where the conjugal visit takes place, to physical contact or penetration made pursuant to a lawful search, or bona fide medical examinations or treatments, including clinical treatments.

(g) Any violation of paragraph (1) of subdivision (a), or a violation of paragraph (2) or (3) of subdivision (a) as described in paragraph (5) of subdivision (d), is a misdemeanor.

(h) Any violation of paragraph (2) or (3) of subdivision (a), as described in paragraph (1), (2), (3), or (4) of subdivision (d), shall be punished by imprisonment in a county jail not exceeding one year, or in the state prison, or by a fine of not more than ten thousand dollars (\$10,000) or by both that fine and imprisonment.

(i) Any person previously convicted of a violation of this section shall, upon a subsequent violation, be guilty of a felony.

(j) Anyone who is convicted of a felony violation of this section who is employed by a department, board, or authority within the Youth and Adult Correctional Agency shall be terminated in accordance with the State Civil Service Act (Part 2 (commencing with Section 18500) of Title 2 of Division 5 of the Government Code). Anyone who has been convicted of a felony violation of this section shall not be eligible to be hired or reinstated by a department, board, or authority within the Youth and Adult Correctional Agency.

SEC. 5. Section 6129 of the Penal Code is repealed.

SEC. 6. Section 6129 is added to the Penal Code, to read:



6129. (a) (1) For purposes of this section, “employee” means any person employed by the Youth and Adult Correctional Agency, the Department of Corrections, the Department of the Youth Authority, the Board of Corrections, the Board of Prison Terms, the Youthful Offender Parole Board, or the Inspector General.

(2) For purposes of this section, “retaliation” means intentionally engaging in acts of reprisal, retaliation, threats, coercion, or similar acts against another employee who has done either of the following:

(A) Has disclosed or is disclosing to any employee at a supervisory or managerial level, what the employee, in good faith, believes to be improper governmental activities.

(2) Has cooperated or is cooperating with any investigation of improper governmental activities.

(b) (1) Upon receiving a complaint of retaliation from an employee, the Inspector General shall commence an investigation within 30 days of receiving the complaint. All investigations conducted pursuant to this section shall be performed, where applicable, in accordance with the requirements of Chapter 9.7 (commencing with Section 3300) of Title 1 of Division 4 of the Government Code.

(2) When investigating a complaint, in determining whether retaliation has occurred, the Inspector General shall consider, among other things, whether any of the following either actually occurred or were threatened:

(A) Unwarranted or unjustified staff changes.

(B) Unwarranted or unjustified letters of reprimand or other disciplinary actions, or unsatisfactory evaluations.

(C) Unwarranted or unjustified formal or informal investigations.

(D) Engaging in acts, or encouraging or permitting other employees to engage in acts, that are unprofessional, or foster a hostile work environment.



(E) Engaging in acts, or encouraging or permitting other employees to engage in acts, that are contrary to the rules, regulations, or policies of the workplace.

(3) Upon authorization of the complainant employee, the Inspector General may release the findings of the investigation of alleged retaliation to the State Personnel Board for appropriate action.

(c) Any employee at any rank and file, supervisory, or managerial level, who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against another employee, pursuant to paragraph (2) of subdivision (a), shall be disciplined by adverse action as provided in Section 19572 of the Government Code. If no adverse action is taken, the State Personnel Board shall invoke adverse action proceedings as provided in Section 19583.5 of the Government Code.

(d) (1) In addition to all other penalties provided by law, including Section 8547.8 of the Government Code or any other penalties that the sanctioning authority may determine to be appropriate, any state employee at any rank and file, supervisory, or managerial level found by the State Personnel Board to have intentionally engaged in acts of reprisal, retaliation, threats, or coercion shall be suspended for not less than 30 days without pay, and shall be liable in an action for damages brought against him or her by the injured party. If the State Personnel Board determines that a lesser period of suspension is warranted, the reasons for that determination must be justified in writing in the decision.

(2) Punitive damages may be awarded by the court if the acts of the offending party are proven to be malicious. If liability has been established, the injured party also shall be entitled to reasonable attorney's fees as provided by law.

(e) Nothing in this section shall prohibit the employing entity from exercising its authority to terminate, suspend, or discipline an employee who engages in conduct prohibited by this section.

(f) The Inspector General, the Youth and Adult Correctional Agency, the Department of the Youth



Authority, the Department of Corrections, the Board of Corrections, the Youthful Offender Parole Board, and the Board of Prison Terms shall refer matters involving criminal conduct to the proper law enforcement authorities in the appropriate jurisdiction for further action. The entity making a referral to the local district attorney shall also notify the Attorney General of the action. If the local district attorney refuses to accept the case, he or she shall notify the referring entity who shall subsequently refer the matter to the Attorney General. If the local district attorney has not acted on the matter, the referring entity shall notify the Attorney General. It is the intent of the Legislature that the Department of Justice avoid any conflict of interest in representing the State of California in any civil litigation that may arise in a case in which an investigation has been or is currently being conducted by the Bureau of Investigation by contracting when necessary for private counsel.

SEC. 7. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.



Approved _____, 1999

Governor

